No. 97-1997

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION,

Petitioner,

vs.

VIRGINIA M. MARQUES,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Two

REPLY BRIEF FOR PETITIONER

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Respondent's opposition notably eschews more than a passing response to the merits of Bank of America's petition. Instead it argues that the petition should be denied because this Court assertedly lacks jurisdiction to review it. But that argument overreads the very cases on which it relies, and, hence, urges a conclusion which those cases do not support.

THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS FINAL FOR JURISDICTIONAL PURPOSES

Respondent argues that the decision of the California Court of Appeal is not a final judgment within the meaning of 28 U.S.C. § 1257(a) and thus that the Court lacks jurisdiction to review it. At base, respondent contends that since further proceedings are required below on remand, the Court should — indeed must — await the conclusion of those proceedings before addressing the question presented here. Should petitioner prevail on remand, the issue would be moot; if respondent prevails, petitioner could seek review in this Court at that point, or so the argument goes.

This Court has considered on numerous occasions the contours of the finality requirement. Perhaps the most detailed recent analysis is contained in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), the case principally relied upon by respondent here. In *Cox*, the Court noted that the finality requirement, if read literally, would "preclude review where anything further remains to be determined by a state court", but went on to observe

> that the rule had not been administered in such a mechanical fashion and that there were circumstances in which there has been "a departure from this requirement of finality for federal appellate jurisdiction".

Cox Broadcasting Corporation, 420 U.S. at 477, quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). The Court further noted that:

> [t]here are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and of delayed justice. . .".

Id. at 477-478.

The fourth of these categories is the one pertinent here:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might

> seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 482-483.

This case falls squarely within the class of cases described in the paragraph just quoted. The federal issue presented here is whether state anti-discrimination laws are preempted by the National Bank Act. 12 U.S.C. § 24 (Fifth). The California Court of Appeal held that they are not. Reversal of that decision by this Court would be preclusive of any further litigation in the state court on the relevant causes of action. Moreover, since there are no other federal issues involved in the litigation, further proceedings on remand would not give rise to possible piecemeal review of federal issues. *See, e.g., Flynt v. Ohio*, 451 U.S. 619, 621 (1981) (per curiam); *Cox Broadcasting Corporation*, 420 U.S. at 477. And finally, where, as here, the federal question is one of preemption, allowing the question of the Bank's liability under state anti-discrimination laws to be adjudicated in the state action would involve a serious risk of eroding important federal statutory policy, to wit: the policy reflected in the National Bank Act and other federal banking statutes that the substantive standard for retention and dismissal of bank officers as established by Congress must be applied uniformly and to the exclusion of state law. *See* Petition at 8-12.[1]

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1. Nor does the decision in *Flynt*, counsel a contrary result here. In *Flynt*, a criminal case, the federal question presented — whether the prosecution was selective or discriminatory and thus violative of the equal protection clause — did not implicate an important or identifiable federal policy. Rather the question involved a general constitutional challenge made in a large number of criminal prosecutions. To treat such a challenge as a basis for breaching the finality rule would, as the Court observed, permit the fourth *Cox* exception to swallow the rule. By contrast, a preemption challenge, like the one here, raises no such specter and on its face necessarily implicates federal policy as manifested in Congressional action at odds with the potentially preempted state law.

Far from suggesting the absence of jurisdiction here, *Cox* demonstrates why such jurisdiction exists. Indeed, the Court in *Cox*, in illustrating the application of the "fourth category" exception, cited two cases, *Construction General Laborers v. Curry*, 371 U.S. 542 (1963) and *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), both of which involved state court decisions rejecting federal preemption claims, the immediate review of which was deemed necessary to further the federal policies involved. *See, Cox Broadcasting Corporation*, 420 U.S. at 483-484; *see also, Belknap v. Hale*, 463 U.S. 491, 497 n.5 (1983). Despite respondent's tepid assertion that there is no longer a need for uniformity in regard to national banks, neither case law nor the critical changes that are taking place in the banking industry offer any support for that position. To the contrary, as the petition demonstrates — with virtually no rebuttal from respondent — there is a strong and enduring national policy in favor of uniformity which is threatened by the decision below. Thus, there is both jurisdiction and good cause to grant the petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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